

Sexting: The 21st Century’s Digital Lovers’ Lane

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Using child pornography offenses to sentence minors for sexting is a gross perversion of the intended use of the statute. This Note proposes an amendment to the federal sentencing structure that would exempt minors from federal child pornography offenses. Although criminal acts do occur by means of sexting between minors (i.e., coerced or nonconsensual sexts), state law can address these problems through existing offenses established to protect adults from the same behavior. The United States Sentencing Commission has the ability to review and propose amendments to current federal sentencing structures and, as an independent agency, can serve as an essential driving force for decriminalization. In support of a class-wide exemption for minors, this Note examines the rationales for criminalizing child pornography and demonstrates how each is inapplicable to the act of sexting between minors. Counterarguments to common social justifications, such as bullying and risky sexual behavior, are also posited to underscore the normalcy of the act. Full exemption is a strong stance, but a sentencing guideline amendment is crucial to ensure adolescents can explore and express their sexuality without incongruous repercussions.

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I. INTRODUCTION

One had to speak of sex; . . . one had to speak of it as of a thing to be not simply condemned or tolerated but managed, inserted into systems of utility, regulated for the greater good of all, made to function according to an optimum. Sex was not something one simply judged; it was a thing one administered.

-Michel Foucault¹

Teen sexuality? Perish the thought. Although widespread statistics report that nearly half of high school students have had sexual intercourse,² America is more comfortable denying or simply ignoring the idea that adolescents are sexual beings.³ But these attitudes are not without cause; nineteenth-century sexual repression still runs strong.⁴ Whether related to religious fervor or social civility, open discourse on—and heaven forbid expression of—sexuality has been stifled for generations.⁵ Modern studies on adolescent sexual development have done much of the heavy lifting to shift attitudes and dispel myths surrounding the dangers of teenage sexual behavior.⁶ In fact, sexual expression

¹ MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 24 (Robert Hurley trans., Vintage Books ed. 1990) (1978).

² KURT CONKLIN, ADVOCATES FOR YOUTH, ADOLESCENT SEXUAL HEALTH AND BEHAVIOR IN THE UNITED STATES: POSITIVE TRENDS AND AREAS IN NEED OF IMPROVEMENT 1 (Feb. 2012), <http://advocatesforyouth.org/storage/advfy/documents/adolescent-sexual-behavior-demographics.pdf> (on file with *Ohio State Law Journal*) (finding that 46% of high school age students and 62% of high school seniors have had sexual intercourse).

³ See R.P. Neuman, *Masturbation, Madness, and the Modern Concepts of Childhood and Adolescence*, J. SOC. HIST., Spring 1975, at 1, 20–21.

⁴ Myrna I. Lewis, *The History of Female Sexuality in the United States*, in WOMEN'S SEXUAL DEVELOPMENT 19, 26 (Martha Kirkpatrick ed., 1980).

⁵ See, e.g., *id.* at 22 (“A lack of interest in sex was an important feature in the repertoire of the . . . delicate American female.”); Neuman, *supra* note 3, at 1 (“[B]efore 1914 many of the best-informed and respected medical authorities . . . labored under the belief that masturbation, particularly among children and adolescents, caused myriad ills . . .”).

⁶ This is not to belittle statistics on pregnancy and contraction of sexually transmitted infections among adolescents. But although these concerns are “well-founded and substantial, a growing number of experts in the field of adolescent sexuality argue that a singular focus on these threats constrains our understanding of adolescent sexuality and hinders our ability to provide teens with needed knowledge, guidance and support.” Laina Y. Bay-Cheng, *The Trouble of Teen Sex: The Construction of Adolescent Sexuality Through School-Based Sexuality Education*, 3 SEX EDUC. 61, 65 (2003) (citations omitted), <http://www.tandfonline.com/doi/pdf/10.1080/1468181032000052162?needAccess=true> [https://perma.cc/9X4Q-AR2D]. See generally Elizabeth K. Canfield, *Young Women and the Sexual Revolution*, in WOMEN'S SEXUAL DEVELOPMENT, *supra* note 4, at 281, 281–89 (arguing that contraception affords an array of options never before available to young women).

and exploration have been linked to “identity formation and the establishment of romantic and social relationships.”⁷

Sexting, one of many forms of adolescent⁸ sexual expression, has taken center stage in recent years due to the legal implications of the act and the related few but tragic teen suicides.⁹ The rise in bully-consciousness may have played a part also, but this Note does not seek to address bullying. Although often mentioned in tandem, bullying and sexting are distinct topics that can—and should—be handled separately.¹⁰ At issue here are the criminal ramifications of

⁷ CONKLIN, *supra* note 2, at 1.

⁸ Within this Note, “adolescent,” “juvenile,” “minor,” “teen,” and “underage” are used interchangeably to refer to the ages associated with post-pubescence. See NAT’L RESEARCH COUNCIL, ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY: SUMMARY OF A WORKSHOP ON NEW RESEARCH 1 (Michele D. Kipke ed., 1999) (range of onset is eight years old to fourteen years old in females and nine years old to fifteen years old in males); C. Ward Crampton, *Pubescence—A Preliminary Report*, 6 AM. ANTHROPOLOGIST 705, 706–09 (1904) (discussing the average age of puberty in a pool of 1,200 high school students and finding onset ranged from eleven years old to eighteen years old).

⁹ “Sexting” is the act of “sending or posting sexually suggestive text messages and images, including nude or seminude photographs, via cellular telephones or over the Internet.” Art Bowker & Michael Sullivan, *Sexting: Risky Actions and Overreactions*, FBI L. ENFORCEMENT BULL. (July 1, 2010), <https://leb.fbi.gov/2010/july/sexting-risky-actions-and-overreactions> [<https://perma.cc/FR6P-JREN>]; see also Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013), <http://www.rollingstone.com/culture/news/sextin-g-shame-and-suicide-20130917> [<https://perma.cc/R8Q6-GYHF>]; AUDRIE & DAISY (Actual Films 2016) (portraying two under-age women in the age of social-media bullying). But see Heidi Strohmaier et al., *Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences*, 11 SEXUALITY RES. & SOC. POL’Y 245, 252 (2014) (“Importantly, despite the pervasiveness of youth sexting in the present study, few negative consequences were described.”).

¹⁰ Sexting may beget bullying and bullying may beget sexting (i.e., sexts may be a tool for bullying and bullying may create coerced sexts), but these are anomalous cases. See Strohmaier et al., *supra* note 9, at 252. Sexting does not inherently incite bullying: a teen can be viciously attacked for any number of things. *Who Is at Risk*, STOPBULLYING.GOV (2017), <https://www.stopbullying.gov/at-risk/factors/index.html> [<https://perma.cc/VD8Z-BRNL>] (last reviewed Feb. 7, 2018) (“No single factor puts a child at risk of being bullied.”). Although teen suicide should never be brushed off lightly, conversations surrounding the issue should center on the larger problem of bullying rather than on problematic instances of underage sexting.

sexts sent between minors.¹¹ Due to the nature of the beast, teen sexting is by definition the creation of child pornography.¹²

At seventeen, Austin Yabandith was charged with sexual assault of a child, sexual exploitation of a child, and possession of child pornography for consensually having sex and sexting with his fifteen-year-old girlfriend.¹³ After negotiating a plea deal, Austin avoided imprisonment, but he still received two misdemeanor convictions and two years of probation.¹⁴ Others are far less fortunate. Whether prosecuted as an adult or as a minor, a child pornography charge can haunt a teen for life. Delinquency may be grounds for expulsion from high school.¹⁵ Prior convictions may affect college admissions or on-campus residency.¹⁶ Employers in many states require prospective employees to disclose their criminal record on job applications.¹⁷ Membership on a sex

¹¹ This Note does not include an in-depth analysis on consensual versus nonconsensual sexts because consent is not an issue specific to juvenile sexting. Consent affects all sexual activities regardless of age, and, as such, cannot adequately be addressed within the scope of this Note. Some states have addressed the nonconsensual creation or distribution of pornography by enacting cyber sexual harassment and revenge-porn laws. *See, e.g.*, FLA. STAT. ANN. § 784.049 (West 2017) (codifying sexual cyberharassment as a criminal offense under the assault, battery, and negligence chapter); NEV. REV. STAT. ANN. § 200.780 (LexisNexis Supp. 2016); *see also* SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., STATE SEXTING LAWS: A BRIEF REVIEW OF STATE SEXTING AND REVENGE PORN LAWS AND POLICIES (July 2015), <http://cyberbullying.org/state-sexting-laws.pdf> [<https://perma.cc/39UZ-CRCT>]; *infra* Part III.

¹² Child pornography is federally defined as any visual depiction, including photographs, films, videos, pictures, drawing, cartoons, sculptures, paintings, and computer images or computer generated images, of a minor engaging in obscene, sexually explicit conduct. 18 U.S.C. §§ 1466A, 2256(8) (2012).

¹³ *DKT Liberty Project Comes to the Rescue in "Romeo and Juliet" Case*, DKT LIBERTY PROJECT (Jan. 20, 2017), <http://dktlibertyproject.org/2017/01/20/dkt-liberty-project-comes-to-the-rescue-in-romeo-and-juliet-case/> [<https://perma.cc/E5MT-97GT>]; *see also* Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony?*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html?_r=0 (on file with *Ohio State Law Journal*) (reporting on two "high school sweethearts" who were nearly charged with "exploiting a minor," a felony under North Carolina child pornography law).

¹⁴ *DKT Liberty Project Comes to the Rescue in "Romeo and Juliet" Case*, *supra* note 13.

¹⁵ *E.g.*, GA. CODE ANN. § 20-2-768 (2016) ("Each local board of education is authorized to refuse to readmit or enroll any student . . . for being convicted of [or] adjudicated to have committed . . . any felony or any delinquent act . . . which would be a felony if committed by an adult.").

¹⁶ Although delinquency adjudications are not required disclosures on college applications, universities may still gain access to juvenile records unless they are expunged. Kim Berkeley Clark, *What Happens in Juvenile Court, Doesn't Always Stay in Juvenile Court: The Myths and Realities About Juvenile Court*, PA. JUV. JUST. (Pa. Juvenile Court Judges' Comm'n, Shippensburg, Pa.), Aug. 2010, at 6–7, <http://www.modelsforchange.net/newroom/152> [<https://perma.cc/5VBY-9H5W>].

¹⁷ *Your Rights: Criminal Records*, WORKPLACE FAIRNESS, <http://www.workplacefairness.org/criminal-records-workplace> [<https://perma.cc/4DCU-LFWU>].

offender registry limits available housing options indefinitely.¹⁸ And the stigma of the conviction may encourage social withdrawal and other disruptive antisocial behavior.¹⁹ But is this truly warranted?²⁰

This Note critiques the justifications behind prosecuting sexting between minors as child pornography and encourages the United States Sentencing Commission (the Sentencing Commission) to advocate for the decriminalization of juvenile sexting through a proposed guideline amendment to the federal child pornography statute. Part II provides the judicial and legislative history of modern child pornography offenses and outlines the current federal sentencing structure, as posited by the Sentencing Commission and affirmed by Congress. Although a minor is more likely to be charged for a child pornography offense under state law than federal law, this Note focuses on the federal sentencing structure because the Sentencing Commission is uniquely situated as a middleman between Congress, various authorities on the federal criminal justice system, and the public, and retains some freedom from special—or socio-moral—interests.²¹ Part III debunks the three buzzwords used to uphold

¹⁸ See CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, THE COMPREHENSIVE ASSESSMENT PROTOCOL: A SYSTEMATIC REVIEW OF ADULT AND JUVENILE SEX OFFENDER MANAGEMENT STRATEGIES 321 (July 2017), <http://www.csom.org/pubs/cap/download/Comprehensive%20Assessment%20Protocol.pdf> [<https://perma.cc/HRK5-SAMA>] (“[T]he inability to find affordable and adequate housing is among the most significant barriers to effective reentry . . .”).

¹⁹ John W. McDavid & Boyd R. McCandless, *Psychological Theory, Research, and Juvenile Delinquency*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 12 (1962) (presenting evidence that if a youth is rejected by society, that youth may go to great lengths to demonstrate his rejection of one system and acceptance of another).

²⁰ See Strohmaier et al., *supra* note 9, at 252 (“Importantly, despite the pervasiveness of youth sexting in the present study, *few negative consequences were described*.” (emphasis added)).

²¹ One purpose of the Sentencing Commission is “to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.” *About*, U.S. SENT’G COMM’N, <http://www.ussc.gov/about-page> [<https://perma.cc/23NX-KP7A>]. And federal child pornography law is particularly relevant to juvenile sexting cases because “federal jurisdiction almost always applies when the Internet is used to commit a child pornography violation.” *Citizen’s Guide to U.S. Federal Law on Child Pornography*, U.S. DEP’T JUST., <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography> [<https://perma.cc/6NJB-GCG7>] (last updated Dec. 12, 2017). *But see* Federal Juvenile Delinquency Act, 18 U.S.C. § 5032 (2012) (providing juveniles should be prosecuted in state courts when possible). Although neither state law nor the lobbying process for congressional enactment are central to the purposes of this Note, these topics have been addressed elsewhere. *E.g.*, Susan Hanley Duncan, *A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator’s Checklist for Drafting the Bill*, 89 OR. L. REV. 645, 692–99 (2010); Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1051–54 (2010); *see also, e.g.*, WENDY WALSH ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., *SEXTING: WHEN ARE STATE PROSECUTORS DECIDING TO PROSECUTE? THE THIRD NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 1* (Jan. 2013),

the criminalization of juvenile sexting: deterrence, distribution, and exploitation. This Note demonstrates the discord between the rationales behind prohibiting child pornography and the ill-fitting application of the federal child pornography statute as a means to prosecute minors for sexting.²² Part IV proposes a guideline amendment to the federal sentencing structure of child pornography offenses that would exclude sexting between persons under age eighteen, virtually decriminalizing the act of juvenile sexting.²³ And finally, Part V reviews the purpose of this Note and reiterates the social and moral grounds for exempting juvenile sexting from the federal child pornography sentencing structure.

II. HISTORY OF UNITED STATES FEDERAL LAW ON CHILD PORNOGRAPHY

Child pornography—as promulgated by Supreme Court decisions, drafted by the Sentencing Commission, and enacted by Congress—is a recently developed area of federal obscenity law. Unlike other types of pornography, child pornography is not prohibited solely on obscenity grounds.²⁴ Instead, child pornography law, as it stands, is the product of judicial and legislative efforts to protect minors from sexual exploitation.²⁵ This undertaking has resulted in an expansive definition of child pornography and an elaborate sentencing structure.

http://www.unh.edu/ccrc/pdf/CV294_Walsh_Sexting%20&%20prosecution_2-6-13.pdf [<https://perma.cc/L5B4-H4H2>] (finding that 62% of state prosecutors had handled a juvenile sexting case and that only 36% had ever filed charges in those cases).

²² To reiterate, this Note focuses on the misapplication of child pornography prohibition rationales to the most common form of juvenile sexting, which involves voluntary and consensual sexting between minors, with neither participant sharing sexts with an unintended third party. However, nonconsensual, involuntary, and unintended third-party sexts are mentioned in passing as inadequate justifications for retaining the current federal sentencing structure.

²³ This Part takes into consideration the public meetings, public hearings, and requested input required under the Sentencing Reform Act as well as statutory procedural requirements enacted by the Sentencing Commission itself. *See* Sentencing Reform Act of 1984, ch. 2, § 212(a), 98 Stat. 1837, 1987 (1984) (as codified as amended in scattered sections of 18 U.S.C.); U.S. SENTENCING COMM’N, RULES OF PRACTICE AND PROCEDURE (2016), <https://www.ussc.gov/about/rules-practice-and-procedure> [<https://perma.cc/3FE8-BND3>]. Although this Note is limited to a discussion on sexting between minors, “Romeo and Juliet laws” are one posited solution, which allow consensual sexual conduct—which may include sexting—in intimate relationships where one partner has reached the age of consent and the other has not. *E.g.*, IND. CODE ANN. § 35-42-4-9(e) (West, Westlaw through 2018 2d Reg. Legis. Sess.). This Note does not distinguish age of consent due to variance in state statutory rape law. *See supra* note 11.

²⁴ *See infra* note 26 (list of obscenity cases).

²⁵ *See infra* note 30 and accompanying text.

A. Supreme Court Cases on Obscenity and Child Pornography

Although defining pornography has proven to be a challenge,²⁶ as Justice Stewart's famous mantra goes, "I know it when I see it."²⁷ Today, obscenity is determined according to the *Miller* standard, under which the trier of fact must consider:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁸

But *child* pornography is not limited to obscenity. The Court found that states—due to their "interest in protecting the children exploited by the production process"²⁹—may ban the sale of material depicting actual children engaged in sexual activity even if the material is not obscene under the *Miller* standard.³⁰ Now, a state may even ban the private possession and viewing of

²⁶ See e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 808–09 (2011); *United States v. Williams*, 553 U.S. 285, 288–91 (2008); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 574–75 (2002); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240–44 (2002); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 67–68 (1994); *Osborne v. Ohio*, 495 U.S. 103, 111–16 (1990); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46–48 (1986); *New York v. Ferber*, 458 U.S. 747, 754–66 (1982); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975); *Jenkins v. Georgia*, 418 U.S. 153, 159–65 (1974); *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 128 (1973); *Miller v. California*, 413 U.S. 15, 24–26 (1973); *Kois v. Wisconsin*, 408 U.S. 229, 230–31 (1972) (per curiam); *Stanley v. Georgia*, 394 U.S. 557, 565–68 (1969); *Redrup v. New York*, 386 U.S. 767, 770–71 (1967) (per curiam); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion); *Jacobellis v. Ohio*, 378 U.S. 184, 190–95 (1964) (plurality opinion); *MANual Enters. v. Day*, 370 U.S. 478, 481–91 (1962) (plurality opinion); *Marcus v. Search Warrant*, 367 U.S. 717, 730–33 (1961); *Roth v. United States*, 354 U.S. 476, 487–91 (1957); *Rosen v. United States*, 161 U.S. 29, 42–43 (1896).

²⁷ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

²⁸ *Miller*, 413 U.S. at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)). Under the *Miller* standard, nudity alone does not make material legally obscene. *Jenkins*, 418 U.S. at 161. Obscenity has no First Amendment protection. *Roth*, 354 U.S. at 481.

²⁹ *Free Speech Coal.*, 535 U.S. at 234.

³⁰

When a definable class of material, . . . bears so heavily and pervasively on the welfare of children engaged in its production, . . . the balance of competing interests is clearly struck and . . . it is permissible to consider these materials as without the protection of the First Amendment.

Ferber, 458 U.S. at 764. But see *Free Speech Coal.*, 535 U.S. at 236 (invalidating the Child Pornography Prevention Act of 1996 for its blanket prohibition of media depicting what appears to be a minor engaging in sexually explicit conduct).

child pornography, regardless of whether or not an individual produced the material.³¹ This decision, handed down in *Osborne v. Ohio*, marked a shift as the Court began to stray from its original rationale behind such intrusions on privacy.³²

The Court rationalized these broadened impositions as a means to restrain the sexual exploitation of children by controlling the distribution network for child pornography and by remedying the harm to the minors depicted in circulating child pornography.³³ But just as the Court warned, the compelling interest to protect the “physical and psychological well-being of [minors]”³⁴ has suppressed protected expression “by allowing the hand of the censor to become unduly heavy.”³⁵ While the judiciary has played a large role in demarcating the legality of pornography, the Court has noted that “Congress may pass valid laws to protect children from abuse, and it has.”³⁶

B. Congressional Acts Combatting Child Sexual Abuse and Exploitation

Congress has remained committed to ending the sexual exploitation of children and has actualized change by enacting several bills to address the problem.³⁷ The 1986 “Meese Report,” which found the production and sharing

³¹ *Osborn*, 495 U.S. at 111 (concerning the private possession and viewing of child pornography); see also *Ferber*, 458 U.S. at 776 (Brennan, J., concurring in the judgment) (“[T]he State has a special interest in protecting the well-being of its youth.” (citing *Ginsberg v. New York*, 390 U.S. 629, 638–41 (1968))). But see *Stanley*, 394 U.S. at 565 (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”).

³² See *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990).

³³ *Ferber*, 458 U.S. at 759 (enumerating the two ways “photographs and films depicting sexual activity by juveniles [are] intrinsically related to the sexual abuse of children”).

³⁴ *Id.* at 756–57 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). But see *Osborn*, 495 U.S. at 143–45 (Brennan, J., dissenting) (“I do not believe [the Court] has struck the proper balance between the First Amendment and the State’s interests, especially in light of the other means available to Ohio to protect children from exploitation . . .”).

³⁵ *Ferber*, 458 U.S. at 756.

³⁶ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

³⁷ See, e.g., Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2, 92 Stat. 7 (1978) (codified at 18 U.S.C. §§ 2251–2253); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2253); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251); Child Abuse Victims’ Rights Act of 1986, Pub. L. No. 99-500, §§ 701–705, 100 Stat. 1783, 1783-74–75 (1986) (codified as amended in scattered sections of 18 U.S.C.); Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18 U.S.C.); Providing Resources, Officers, and Technology To Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (2008) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.); Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (2008) (codified as amended at 42 U.S.C. §§ 16901, 16915a);

of child pornography causes serious harm, surmised that if the “sale or distribution of such pictures [was] stringently sanctioned, and if those sanctions [were] equally stringently enforced, the market may decrease, and . . . may in turn decrease the incentive to produce those pictures.”³⁸ Accordingly, Congress passed increasingly restrictive legislation as a deterrent for potential offenders.³⁹ These legislative acts recognize the “physiological, psychological, and emotional harm caused by the production, distribution, and display of child pornography.”⁴⁰ With advances in technology as a catalyst in the child pornography market, Congress has necessarily had to adapt its legislation.⁴¹ To inform its decisions, Congress uses sentencing guidelines, requested through congressional directives and proposed by the Sentencing Commission.⁴²

C. Federal Child Pornography Offenses and Their Respective Sentences

Child pornography encompasses “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct” involving a minor or what appears to be a minor.⁴³ Currently, the production, advertising, distribution, transportation, importation, receipt, solicitation, or possession of any media that meets the definition of child

Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified as amended in scattered sections of 18 U.S.C.).

³⁸ ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 413 (July 1986) [hereinafter MEESE REPORT].

³⁹ See *infra* Part III.A.

⁴⁰ Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, § 702, 100 Stat. 1783, 1783-74-75 (1986) (codified as amended in scattered sections of 18 U.S.C.).

⁴¹ See 18 U.S.C. § 2252A(a)(7) (2012).

⁴² See U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES I (Oct. 2009) [hereinafter U.S. SENTENCING HISTORY], http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf [<https://perma.cc/N6H5-XJE5>].

⁴³ 18 U.S.C. § 2256(8); see also *id.* § 1466A; *id.* § 2252A(a)(7); U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (U.S. SENTENCING COMM'N 2016) [hereinafter 2016 GUIDELINES MANUAL], <http://www.ussc.gov/guidelines/2016-guidelines-manual> [<https://perma.cc/L47Y-ZZEN>].

pornography is a crime.⁴⁴ According to the Sentencing Reform Act of 1984,⁴⁵ criminal sentences are allocated for the following purposes:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner⁴⁶

In 1987, the Sentencing Commission⁴⁷ promulgated guidelines—enacted by Congress later that same year—on federal sentences for child pornography-related offenses.⁴⁸

Using the same factors a sentencing court must consider under 18 U.S.C. § 3553(a),⁴⁹ the Sentencing Commission established a child

⁴⁴ 18 U.S.C. § 2251; *id.* § 2252(a)(1)–(4); *id.* § 2252A(a)(1)–(7); *id.* § 2260(a)–(b). Again, child pornography “media” is federally defined as any visual depiction, including photographs, films, videos, pictures, or computer images or computer-generated images, as well as drawings, cartoons, sculptures, and paintings. *See id.* §§ 1466A(f)(1), 2256(8). But other mediums, such as erotica, can, and are, prosecuted under broader state child pornography laws. *E.g.*, Associated Press, *Child Pornography Writer Gets 10-Year Prison Term*, N.Y. TIMES (July 14, 2001), <http://www.nytimes.com/2001/07/14/us/child-pornography-writer-gets-10-year-prison-term.html> (on file with *Ohio State Law Journal*) (possessing a sexually explicit journal constituted possession of obscene *material* involving children under a 1989 Ohio law).

⁴⁵ Sentencing Reform Act of 1984, ch. 2, § 212(a), 98 Stat. 1837, 1987 (1984) (as codified as amended in scattered sections of 18 U.S.C.).

⁴⁶ 18 U.S.C. § 3553(a)(2).

⁴⁷ The Sentencing Reform Act of 1984 created the Sentencing Commission to “establish sentencing policies and practices for the Federal criminal justice system” Sentencing Reform Act of 1984 § 217(b). The Sentencing Commission is also tasked with periodically reviewing and revising the guidelines in consideration of known comments and data. 28 U.S.C. § 994(o); *see also* Notice of Final Priorities, 74 Fed. Reg. 46,478, 46,479 (Sept. 9, 2009) (requiring the Sentencing Commission to provide “recommendations to Congress on any statutory changes that may be appropriate”). *See generally* 2016 GUIDELINES MANUAL, *supra* note 43 (providing details on the Sentencing Commission’s guidelines).

⁴⁸ *See* U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, 16–26 (June 1987) [hereinafter U.S. SENTENCING SUPPLEMENTARY], http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf [https://perma.cc/KLD2-GQJ8].

⁴⁹ These factors include: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences available; the sentencing range established for the applicable category of offense committed by the applicable category of defendant; any pertinent policy statement; the need to avoid unwarranted sentence disparities; and the need to provide restitution to victims. 18 U.S.C.

pornography sentencing structure using base offense levels across categories of pornography, which are subject to level increases if the pornography contains specific characteristics.⁵⁰ Since enactment, these guidelines have been amended nine times in response to technological advancements in image sharing and variance in congressional priorities.⁵¹

In the 2009 Amendments, the Sentencing Commission responded to the Providing Resources, Officers, and Technology to Eradicate Cyber Threats (PROTECT) Our Children Act⁵²—which created a new offense prohibiting the production of a morphed image (child pornography that is an adapted or modified depiction of an identifiable minor) with intent to distribute or knowingly distribute⁵³—by recommending a base offense level of eighteen and no mandatory minimum term of imprisonment.⁵⁴ The United States Department of Justice and the Federal Public Defenders submitted public comments in support of the promulgation,⁵⁵ which suggests a larger understanding that some forms of child pornography may constitute less serious crimes. This planted the first seed of leniency toward materials that do not constitute the type or magnitude of child pornography that the sentencing structure was designed to prohibit originally.⁵⁶ The Sentencing Commission's willingness to address

§ 3553(a). *But see* 28 U.S.C. § 994(m) (“The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.”). *See generally* U.S. SENTENCING HISTORY, *supra* note 42, at 2–5 (summarizing the guidance the Sentencing Reform Act established for actions by the Sentencing Commission).

⁵⁰ 2016 GUIDELINES MANUAL, *supra* note 43, §§ 2G2.1, 2G2.2; *see also* U.S. SENTENCING HISTORY, *supra* note 42, at 10–11.

⁵¹ *See* U.S. SENTENCING HISTORY, *supra* note 42 (detailing the progression of sentencing guidelines since 1987); *see also* U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY OFFENSES 41 (Dec. 2012) [hereinafter U.S. SENTENCING FEDERAL], https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf [<https://perma.cc/U4ZE-9AGY>].

⁵² Providing Resources, Officers, and Technology To Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (2008).

⁵³ 18 U.S.C. § 2252A(a)(7).

⁵⁴ Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2009, 74 Fed. Reg. 21,750, 21,759 (May 8, 2009); *see also* U.S. SENTENCING HISTORY, *supra* note 42, at 51–52 (establishing the base level for distribution of morphed images four levels lower than the standard base level for other child pornography distribution offenses).

⁵⁵ *See* Jon M. Sands, Federal Public Defender, Comment Letter to Proposed Miscellaneous Amendments (Mar. 27, 2009) [hereinafter Sands, Comment Letter], https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20090300/FPD_MiscPC_032709.pdf [<https://perma.cc/2BF3-4L32>]; *see also* Miscellaneous Amendments: Public Hearing on Proposed Amendments for 2009 Before the U.S. Sentencing Comm’n (2009) (written statement of Jon M. Sands, Chair, Fed. Def. Sentencing Guidelines Comm.) [hereinafter Sands, Statement].

⁵⁶ *See* U.S. SENTENCING HISTORY, *supra* note 42, at 51 (“[P]roduction of a morphed image . . . is not as serious a crime as the production of genuine child pornography.”).

individually new forms of “child pornography” within the greater statutory framework suggests the agency may be sympathetic to revising the overbreadth that allows for prosecution of voluntary and consensual juvenile sexting. A notice and comment period to discuss amending child pornography sentencing may bring the fallacies to light.

III. THE FLAWED RATIONALES OF FEDERAL CHILD PORNOGRAPHY LAW

Under the Sentencing Reform Act, the Sentencing Commission must comply with the notice and comment provisions of the Administrative Procedure Act to consider “comments and data” when suggesting revisions to a sentencing structure.⁵⁷ Before promulgation, the Sentencing Commission must revise the proposed amendment to reflect comments and testimony received at public meetings and public hearings.⁵⁸ Since the last amendments were revised and ratified by Congress in 2009, the prevalence of teen sexting has increased rapidly in response to technological advances and access to cellphones.⁵⁹ In the past eight years, national organizations, scientific studies, and individual citizens have presented arguments, data, studies, and personal accounts that support the decriminalization of sexting between minors.⁶⁰ When laid out and examined, this information debunks the three main rationales for criminalizing juvenile sexting as a form of child pornography: deterrence, distribution, and extortion.

A. Deterrence

Deterrence is a theory of criminal law that suggests that having well-defined punishments for criminal acts will discourage individuals from repeating offenses and discourage society as a whole from similar conduct.⁶¹ But theory and practice are two different worlds. Although federal child pornography law follows the deterrence theory to a tee, the sentencing structure does not serve its

⁵⁷ 28 U.S.C. § 994(o); *see also* 5 U.S.C. § 553.

⁵⁸ U.S. SENTENCING HISTORY, *supra* note 42, at 5.

⁵⁹ As of 2016, 91% of teenagers can access the Internet through a smartphone or similar device. *Teen Sexting on the Rise: What This Could Mean for Your Child*, TEENSAFE (Apr. 21, 2016), <https://www.teensafe.com/blog/teen-sexting-rise-mean-child/> [<https://perma.cc/29X4-A3MH>]; Jeff R. Temple et al., *Teen Sexting and Its Association with Sexual Behaviors*, 166 ARCHIVES PEDIATRICS & ADOLESCENT MED. 828, 828 (2012) (finding that 28% of teens had sent a sext and that 31% had requested a sext); *see also* Strohmaier et al., *supra* note 9, at 245 (reporting over half of participants engaged in sexting as minors).

⁶⁰ *See infra* Parts III.A–C.

⁶¹ *See* VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 2 (Nov. 2010), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf> [<https://perma.cc/BJ8H-F9W4>].

purpose with respect to juvenile sexting.⁶² Teens may be unaware of the illegality; they may not know the severity; or they may not believe they will get caught.⁶³ These findings show deterrence is an ineffective and flawed rationale for treating juvenile sexting as a child pornography offense.

Sexting is common.⁶⁴ Although self-reporting studies are limited in their scale and accuracy, studies have found results of one-fifth, one-third, or as high as 54% of teenagers admit to sending a sext as a minor.⁶⁵ In a 2015 study, 61% of the participating, self-reporting juvenile sexters were unaware of the potential legal consequences.⁶⁶ About half of that 61% said knowing those consequences as a minor “would have” or “probably would have” deterred them, but this is

⁶² The Sentencing Commission develops sentencing guidelines using several criminal law philosophies including punishment as deterrence. See 18 U.S.C. § 3553(a)(2)(B); 28 U.S.C. § 994(c); U.S. SENTENCING HISTORY, *supra* note 42, at 54. And Congress implemented harsh sentences for child pornography offenses to deter first-time and potential repeat offenders from engaging in the statutorily prohibited conduct. Jonathan J. Wroblewski, Director, Office of Policy and Legislation, United States Department of Justice, Comment Letter on Proposed Priorities and Request for Public Comment, at 4 (July 29, 2014), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf> [<https://perma.cc/86RD-X8PL>] (“It was thought that certainty in sentencing—certainty in the imposition of a particular sentence for a particular crime, and certainty in the time to be served for a sentence imposed—would simultaneously improve public safety by deterring new criminality . . .”).

⁶³ See Strohmaier et al., *supra* note 9, at 251 (revealing only 5% of participants knew a teen who had gotten in trouble with the law for sexting).

⁶⁴ *Id.* at 250–57. But see Kimberly J. Mitchell et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, 129 PEDIATRICS 13, 13, 18–19 (2012) (suggesting that receiving sexual images is far from normative behavior for youth).

⁶⁵ ASSOCIATED PRESS & MTV, A THIN LINE 2 (2009) http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf [<https://perma.cc/C5JM-ZPSR>] (finding that three in ten young people reported they had been involved in some type of sexting); THE NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (Dec. 2008), https://drvc.org/pdf/protecting_children/sextech_summary.pdf [<https://perma.cc/SZC9-WRLU>] (finding that 33% of young adults overall had sent nude images of themselves and that 39% reported sending or posting sexually suggestive messages); Donald S. Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42 ARCHIVES SEXUAL BEHAV. 15, 15–16 (2013) (finding that “20% of teens surveyed reported that they had ‘participated in sexting’”); Strohmaier et al., *supra* note 9, at 250 (revealing that 54% of respondents sent sexts as minors). Studies like these are subject to the availability of participants and their willingness to give sincere answers. Even if the questions are not leading, participants may give the answer they believe you—or society at large—want to hear. And even if the survey is anonymous, there is no way to control for shame.

⁶⁶ In 2013, only 33% of sexting participants knew of the legal consequences. Strohmaier et al., *supra* note 9, at 246. These numbers have not improved much, even with high publicity and community involvement. *Id.* at 251 (finding 61% of sexting participants were not aware of the legal consequences).

just self-reported speculation.⁶⁷ In actuality, teens are rarely convinced that anything will come from this behavior.⁶⁸

The National Institute of Justice has found that “increasing the severity of punishment does little to deter crime,” and instead, “the *certainty* of being caught is a . . . more powerful deterrent than the punishment.”⁶⁹ Statistics in these areas are scarce, but the vast majority of teens that engage in sexting will not be arrested, and the few that are convicted are likely to receive vastly incongruous punishments that may not reach the public’s—or their peer’s—attention.⁷⁰ The frequency of arrests and the consistency in punishment for juvenile sexting is just too insufficient to create the certainty necessary to deter the behavior.⁷¹ The other major rationales for prohibiting child pornography are equally inapplicable when applied to juvenile sexting, suggesting the need for a new approach better suited to this modern phenomenon.

B. Distribution

Going hand in hand with deterrence, the distribution of pornographic materials depicting minors is another major policy concern.⁷² The over-inclusiveness of the federal child pornography sentencing structure has been defended by the need to control the distribution networks of child pornography.⁷³ Due to the permanency of a sext and the possibility that the

⁶⁷ *Id.* at 251.

⁶⁸ See *Why Young People Might Not Heed Your Warnings*, UCL (Sept. 10, 2013), <https://www.ucl.ac.uk/news/news-articles/0913/10092013-Why-young-people-might-not-heed-warnings-Sharot> [<https://perma.cc/WNJ6-T49A>] (citing Christina Moutsiana et al., *Human Development of the Ability To Learn from Bad News*, 110 PROC. NAT’L ACAD. SCI. 16,396 (2013)) (indicating that teens are not deterred by warnings about the consequences of engaging in risky behavior).

⁶⁹ NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, NCJ 247350, FIVE THINGS ABOUT DETERRENCE (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/KF9B-WB77>] (summarizing Daniel Nagin’s book on deterrence in the twenty-first century).

⁷⁰ Janis Wolak et al., *How Often Are Teens Arrested for Sexting? Data From a National Sample of Police Cases*, 129 PEDIATRICS 4, 7 (2012) (finding arrests are atypical in cases involving no adults); see also HINDUJA & PATCHIN, *supra* note 11; Strohmaier et al., *supra* note 9, at 251 (revealing only 5% of participants knew a teen who had gotten in trouble with the law for sexting). Because many juvenile sexting cases are dependent upon their varying circumstances, prosecutorial and judicial discretion create an additional layer of uncertainty. Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 1, 25–31 (2010).

⁷¹ This is not to say creating a consistent federal sentencing structure to address child pornography is the appropriate remedy. A proposed guideline that establishes a child pornography offense for juvenile sexting, regardless of leniency, is still outside the scope and intent of the Supreme Court and Congress’s past acts. See *supra* Parts II.A–B; see *infra* Part IV (suggesting new sentencing guidelines for teen sexting).

⁷² See *New York v. Ferber*, 458 U.S. 747, 759 (1982).

⁷³ *Id.* at 759–91; MEESE REPORT, *supra* note 38, at 413. Though some might argue sexting is inherently a child pornography distribution network, this Note refers to a “child

image may come into the possession of an unintended recipient,⁷⁴ the Court, Congress, and the Sentencing Commission view juvenile sexting as an amateur source for sophisticated child pornography distribution networks.⁷⁵ But advances in technology hinder the criminal justice system's ability to crack down on child pornography, seeing as how distribution networks are amorphous and constantly evolving, which makes them difficult to eradicate.⁷⁶

There is no argument that sexts are anything less than viable—potentially permanent—images.⁷⁷ But the modes and behaviors involved in juvenile sexting, in large part, do not create the opportunity for sexts to become part of a child pornography distribution network. Most sexts are exchanged between voluntary and consensual sexting partners through text message.⁷⁸ Although recipients do on occasion save sexts and/or forward them to unintended

pornography distribution network” based on the meaning developed in *United States v. Williams*. *United States v. Williams*, 553 U.S. 285, 295 (2008) (“Distribution may involve sophisticated pedophile rings or organized crime groups that operate for profit, but in many cases, is carried out by individual amateurs . . .”); *see also infra* Part III.C (discussing the importance of preventing the exploitation of children).

⁷⁴ *Williams*, 553 U.S. at 303 (“[T]he government[] [has an] interest in preventing the distribution of materials that constitute ‘a permanent record’ of the children’s degradation whose dissemination increases ‘the harm to the child.’”); U.S. SENTENCING FEDERAL, *supra* note 51, at 311. (“Once an image is distributed via the Internet, it is impossible to eradicate all copies of it or to control access to it. The harm to victims is thus lifelong.” (footnote omitted)).

⁷⁵ *See Williams*, 553 U.S. at 295; U.S. SENTENCING FEDERAL, *supra* note 51, at 312–14. *But see* Rebecca L. Collins et al., *Influence of New Media on Adolescent Sexual Health: Evidence and Opportunities* 32 (U.S. Dep’t of Health & Human Servs., Working Paper No. 761, 2011), <https://aspe.hhs.gov/sites/default/files/pdf/76191/index.pdf> [<https://perma.cc/6HND-MNE6>].

⁷⁶ *Cf.* U.S. SENTENCING COMM’N, REVISED REPORT OF THE WORKING GROUP ON CHILD PORNOGRAPHY AND OBSCENITY OFFENSES AND HATE CRIME 9 (Jan. 1990) (describing sentencing guidelines for child pornography distributed through the mail). *See generally* Vivek Wadhwa, *Laws and Ethics Can’t Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014), <https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/> [<https://perma.cc/5KHM-KZHE>] (describing regulatory gaps created by technology advances).

⁷⁷ Sexts may constitute sexually suggestive text messages also, and these messages may be stored electronically or captured in screenshots. *See Bowker & Sullivan, supra* note 9. Another modern means of sexting is through the smartphone app, Snapchat, which allows users to send images or videos to contacts for up to ten seconds, which the recipient can view and replay once before the image disappears. *E.g.*, Rachel Thompson, *For Better or for Worse, Snapchat Changed Sexting Forever*, MASHABLE (Feb. 7, 2017), http://mashable.com/2017/02/07/snapchat-sexting-revolution/#Bz_GDfFgpaqP [<https://perma.cc/W5VX-MBBG>] (“Snapchat’s perceived ‘low risk factor’ gives people the courage to experiment with sexting on the condition you have a ‘mutual agreement not to screenshot.’”).

⁷⁸ Strohmaier et al., *supra* note 9, at 252 (“This [study] also highlights the important distinction between what appears to be the more common practice of consensual sexting that occurs within the context of a romantic relationship, and the more extreme cases of sexting that involve exploitation, extortion, and harassment.”).

recipients, the probability that these images make their way to a child pornography distribution network is minimal.⁷⁹

Although individuals may store images to the memory of their electronic device or on data storage programs like Google Cloud or Dropbox,⁸⁰ there is no reason to believe a juvenile sexter is more likely to have their sent or received sexts stolen, hacked, or leaked than any other person.⁸¹ And even when sexts are forwarded to unintended recipients, they are usually sent within the receiver's offline social network.⁸² In the grand scheme of snuffing out distribution networks, imposing heavy sanctions on the few juvenile sexts that funnel into sophisticated child pornography channels is like trying to end global warming by incarcerating litterbugs—emphasis is placed on the wrong offenders.

Some juvenile sexts inevitably will reach a formal child pornography distribution network, but due to the infrequency with which this is likely to occur, the focus should be on the harm to the depicted minor(s).⁸³ Whether or not a minor is being exploited goes to the root of the governmental interest in prohibiting the production, advertisement, distribution, transportation, importation, receipt, solicitation, or possession of any media that meets the definition of child pornography.⁸⁴

⁷⁹ See *infra* note 82.

⁸⁰ *Cloud Storage*, GOOGLE (2017), <https://cloud.google.com/storage/> [<https://perma.cc/866M-UAGS>]; *Online Backup and File Storage*, DROPBOX BUSINESS, <https://www.dropbox.com/business/tour/online-backup> [<https://perma.cc/KP7P-UTXN>].

⁸¹ See, e.g., *FBI Investigates 'Cloud' Celebrity Picture Leaks*, BBC NEWS (Sept. 2, 2014), <http://www.bbc.com/news/technology-29011850> [<https://perma.cc/WXU7-VNLZ>].

⁸² Of the 54% of self-reported sexting participants, only 3% have shared a received sext with a mere acquaintance, whereas 26% shared a sext with a good friend. Strohmaier et al., *supra* note 9, at 250. These numbers may seem concerning at first blush, but only 11% of participants in the same study reported knowing a sext had been shared with an unintended third party. *Id.* at 250. Only 8% of participants reported experiencing negative consequences of sexting, such as humiliation or a tarnished reputation. *Id.* at 251. This suggests most forwarding is intimate and handled discreetly, whereas large-scale public sharing is atypical. No available studies account for whether forwarded sexts are sent to unintended recipients within the receiver's age group, but this data would be relevant to the Sentencing Commission.

⁸³ The focus should not be on the potential harm to other minors due to the possibility that a juvenile sext may find its way into child pornography distribution networks.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (citing *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)).

⁸⁴ The United States Code outlines the offenses for production, advertisement, distribution, transportation, importation, receipt, solicitation, or possession of child

C. Exploitation

As Brennan quipped in 1990, “the Court today is so disquieted by the possible exploitation of children in the *production* of the pornography that it is willing to tolerate the imposition of criminal penalties for simple *possession*.”⁸⁵ Exploitation involves “the use of [a] child in work or other activities for the benefit of others and to the detriment of the child’s physical or mental health, development, and education.”⁸⁶ Although sexting is correlated positively to sexual risk behavior and has been involved in instances of sextortion, the vast majority of teen sexters report no negative effects from participating in the activity.⁸⁷ Child exploitation is a rightfully concerning issue, but exploitation that occurs through coercive sexting can be properly handled outside of the federal sentencing structure for child pornography.⁸⁸

pornography. 18 U.S.C. § 2251; *id.* § 2252(a)(1)–(4); *id.* § 2252A(a)(1)–(7); *id.* § 2260(a)–(b).

⁸⁵ *Osborne v. Ohio*, 495 U.S. 103, 143 (1990) (Brennan, J., dissenting). Justice Brennan continues,

I do not believe that [the Court] has struck the proper balance between the First Amendment and the State’s interests, especially in light of the other means available to . . . protect children from exploitation and the State’s failure to demonstrate a causal link between a ban on possession of child pornography and a decrease in its production.

Id. at 144–45.

⁸⁶ ACTION FOR THE RIGHTS OF CHILDREN, CRITICAL ISSUES: ABUSE AND EXPLOITATION 3 (Apr. 2001), <http://www.unhcr.org/3bb81aea4.pdf> [<https://perma.cc/5TRC-TVJ5>].

⁸⁷ “Sexual risk behavior” is a term that describes actions that increase a minor’s risk of pregnancy, transmission of sexually transmitted diseases and/or infections, or sexual assault. See *Sexual Risk Behaviors: HIV, STD, & Teen Pregnancy Prevention*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyyouth/sexualbehaviors/> [<https://perma.cc/QQT3-ZVZR>] (last reviewed Aug. 4, 2017); see also Michele L. Ybarra & Kimberly J. Mitchell, “Sexting” and Its Relation to Sexual Activity and Sexual Risk Behavior in a National Survey of Adolescents, 55 J. ADOLESCENT HEALTH 757, 762 (2014). Sextortion is not exclusive to juvenile sexting or sexting more generally, but covers a broader category of sexual misconduct. According to the Federal Bureau of Investigation, “Sextortion . . . occurs when someone threatens to distribute your private and sensitive material if you [do not] provide them images of a sexual nature, sexual favors, or money.” *What Is Sextortion?*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/video-repository/newss-what-is-sexortion/view> [<https://perma.cc/AA7G-LH2S>].

⁸⁸ But see Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 50 (2007) (“The creation of child pornography through juvenile self-exploitation is a growing phenomenon with severe social harms, similar to that of other forms of child pornography possession, production, and distribution. . . . The fact of self-harm, alone, however, cannot justify a refusal to prosecute juveniles for self-exploitation.”).

Quantitative studies suggest sexting is positively related to sexual risk behavior,⁸⁹ but qualitative studies butt heads with these findings.⁹⁰ In one study, the Crimes Against Children Research Center found:

The sharing of sexual images, while risqué in one cultural dimension, may also be a form of sexual sharing that has some comparative safety to it in contrast to face-to-face sexual intimacy, since it can be engaged in outside the presence of the other person. Thus the feelings of immediate embarrassment may be more manageable, a youth can control how she or he appears to another, and the pressure for additional sexual intimacy is not so intense and immediate, as it might be in a face-to-face sexual encounter.⁹¹

Additionally, studies on sexual risk behavior do not account for relative knowledge of sexual health or disparities in age, sex, race or ethnicity, socioeconomic status, and religion.⁹² This does not combat the correlation between sexual risk behavior and sexting, but it does complicate what these results mean.

Generally, juvenile sexting occurs between voluntary, consensual minors with few consequences. Independent, national surveys show that the “sexual solicitation of minors is more likely to be perpetrated by other minors than by adults.”⁹³ Additionally, studies show “[m]ost of these exchanges . . . are with

⁸⁹ These behaviors include sex with multiple partners and sex without a condom. See Temple et al., *supra* note 59, at 831; J. Rosenberg, *Sexting Is Positively Linked to Sexual Experience Among Middle School Students*, 46 PERSP. ON SEXUAL & REPROD. HEALTH 242, 242–43 (2014). But see Mitchell et al., *supra* note 64, at 19 (arguing sexting may just make youth sexual behavior more visible to adults and authorities). “Some studies fail to reveal any significant associations between sexting and problematic psychological or health behaviors such as negative emotionality or social conflict.” Strohmaier et al., *supra* note 9, at 247 (citing ELIZABETH ENGLANDER, MASS. AGGRESSION REDUCTION CTR., LOW RISK ASSOCIATED WITH MOST TEENAGE SEXTING: A STUDY OF 617 18-YEAR-OLDS (July 2012), <http://webhost.bridgew.edu/marc/sexting%20and%20coercion%20report.pdf> [<https://perma.cc/9C62-VKGC>]).

⁹⁰ See JANIS WOLAK & DAVID FINKELHOR, CRIMES AGAINST CHILDREN RESEARCH CTR., SEXTING: A TYPOLOGY 8 (Mar. 2011), <http://scholars.unh.edu/cgi/viewcontent.cgi?article=1047&context=ccrc> (on file with *Ohio State Law Journal*); Strohmaier et al., *supra* note 9, at 247.

⁹¹ WOLAK & FINKELHOR, *infra* note 90, at 8 (footnote omitted).

⁹² See, e.g., Strassberg et al., *supra* note 65, at 19; Strohmaier et al., *supra* note 9, at 247. But see ASSOCIATED PRESS & MTV, *supra* note 65, at 5 (finding young people of all races and socioeconomic backgrounds to be targets of digital abuse).

⁹³ Collins et al., *supra* note 75, at 30; see also BERKMAN CTR. FOR INTERNET & SOC’Y, ENHANCING CHILD SAFETY AND ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES 52 (Dec. 2008), https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf [<https://perma.cc/NGZ4-35XJ>].

persons already part of teens' offline social networks."⁹⁴ And few minors reported experiencing a negative consequence after participating in sexting.⁹⁵ Because "exploitation," from either the negative effect on the minor or the particular circumstances motivating the act, only occurs in a minority of juvenile sexting cases, the states are more than capable of handling these instances in the absence of the federal sentencing structure for child pornography.

Coercion, extortion, or harassment that results in sending or receiving unwelcome sexts does occur, as does the sharing of sexts with unintended recipients.⁹⁶ But these issues also occur in adult sexual relationships and are being handled appropriately outside of the federal child pornography sentencing framework.⁹⁷ State legislatures have responded to the issues of coercive sexting and third-party sharing between adults through enactment of cyber-sexual harassment and nonconsensual pornography laws—which encompass revenge porn laws.⁹⁸ These statutory structures, as defined and developed by the states, can account for similar behavior among minors instead of the disproportionate punishment juvenile sexting receives as a child pornography offense.

IV. PROMULGATING A NEW SENTENCING GUIDELINE

Before promulgating a new sentencing guideline, the Sentencing Commission must consider input from the "authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system,"⁹⁹ and the guideline must follow congressional directives to be passed

⁹⁴Collins et al., *supra* note 75, at 32 (citing a survey by the National Campaign to Prevent Teen and Unplanned Pregnancy).

⁹⁵A 2015 study found participants "generally reported experiencing few negative social or legal consequences as a result of sexting." Strohmaier et al., *supra* note 9, at 251. Another study, conducted across 2011 and 2012, found "students who sexted because they wanted to" had "rates of discovery or troubles [that] were very, very low." ENGLANDER, *supra* note 89, at 10.

⁹⁶ENGLANDER, *supra* note 89, at 10 ("[T]he most troubling issue . . . about sexting is the probability that many kids sext when coerced or pressured to do so.").

⁹⁷See Lizette Borrelli, *Why Couples Engage in Unwanted Sexting: Half of Men and Women 'Requixext' Because of Abandonment Anxiety*, MED. DAILY (Jan. 2, 2014), <http://www.medicaldaily.com/why-couples-engage-unwanted-sexting-half-men-and-women-requixext-because-abandonment-anxiety-266220> (on file with *Ohio State Law Journal*) (describing sexting as a "compliant sexual activity" in adult relationships).

⁹⁸HINDUJA & PATCHIN, *supra* note 11, at 1. Nonconsensual sexting can also fall under some state sexual harassment laws. See, e.g., FLA. STAT. ANN. § 784.049 (West 2017); S. 255, 2013–2014 Reg. Sess. (Cal. 2013); see also Kallee Spooner & Michael Vaughn, *Youth Sexting: A Legislative and Constitutional Analysis*, 15 J. SCH. VIOLENCE 213, 217 (2016).

⁹⁹28 U.S.C. § 994(o) (2016). These include individuals and institutional representatives from the United States Department of Justice, the Federal Public Defenders, the United States Probation System, the Bureau of Prisons, and the Judicial Conference of the United States. *Id.*

into law.¹⁰⁰ Although broad public policy seems not to support decriminalization of sexting,¹⁰¹ the Sentencing Commission may still draft such a guideline to dispel outdated justifications, combat misinformation, and encourage a holistic approach encompassing a broader consideration of criminal justice philosophies behind sentencing.¹⁰²

A. *Proposing a Sentencing Guideline Amendment*

The Sentencing Commission was created to address legislative concern regarding “elimination of undue leniency in sentencing,” “undue severity and an excessive reliance on imprisonment,” and, more generally, the “disparity and inequality of treatment in sentencing of similar defendants who had committed similar crimes.”¹⁰³ To do so, the Sentencing Commission conducts research “to assist in the development, implementation, monitoring, and evaluation of guidelines.”¹⁰⁴ This research, as well as the public comments and public hearings, would provide fuller national statistics—likely reflective of the small scale studies referenced in Part III—using quantitative and qualitative data to evaluate the effects of prosecuting juvenile sexting as a child pornography offense.¹⁰⁵ These results would underscore the variance in factual circumstances, which create vastly disparate sentences, and the inconsistency with which these offenses are prosecuted.

Using sentencing to address the varying circumstances surrounding child pornography offenses can be either broad based and categorical, or tailored to minute distinction.¹⁰⁶ Both structures have their flaws.¹⁰⁷ Because child pornography offenses cover such a wide range of actions, the prohibition is defended, using various criminal law philosophies, based on the offense at hand.¹⁰⁸ The Sentencing Commission’s approach to the federal child pornography sentencing guidelines is the same as its approach to the entire federal statutory structure: using just deserts, crime control, deterrence, and/or recidivism rationales to provide consistency and relative proportionality between offenses and sentences.¹⁰⁹ This holistic approach allows for some specificity in the way the criminal justice system addresses particular child pornography offenses.

¹⁰⁰ *Id.* § 994(p); *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

¹⁰¹ *But see* Joanna R. Lampe, Note, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 U. MICH. J.L. REFORM 703, 725–29 (2013); Spooner & Vaughn, *supra* note 98, at 228–30.

¹⁰² *See* U.S. SENTENCING SUPPLEMENTARY, *supra* note 48, at 15–17 (describing philosophical bases); *see also* 18 U.S.C. § 3553(a)(2).

¹⁰³ U.S. SENTENCING SUPPLEMENTARY, *supra* note 48, at 7–8.

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *See* discussion *supra* Part III.

¹⁰⁶ U.S. SENTENCING SUPPLEMENTARY, *supra* note 48, at 14.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 15–16.

¹⁰⁹ *Id.* at 17.

Case in point, the sentencing guidelines for “morphed images.”¹¹⁰ Because no child is exploited in the process of producing “virtual” child pornography, the federal child pornography sentencing structure as it existed was too stringent to apply to this new offense.¹¹¹ To create an appropriate sentence, the Sentencing Commission reviewed public comments, legislative history, and the existing guideline structure.¹¹² Like the morphed images offense,¹¹³ juvenile sexting spawned from advances in technology, which created a new form of pornography that, due to its creation and distribution, has a lesser harm on the minor depicted than “genuine” child pornography.¹¹⁴ Using this rationale, it is likely that the Department of Justice and the Federal Public Defenders would support similar leniency toward juvenile sexting.¹¹⁵

Although judges have the discretion to grant sentences below the established mandatory minimums, it is still necessary for the Sentencing Commission to address juvenile sexting in a sentencing guideline to create uniformity in prosecution, which currently lacks cohesion.¹¹⁶ Consistency through elimination is the most appropriate solution to the overbreadth of the federal child pornography statutory structure because: 1. This amendment is easy to implement within the existing statutory language; and 2. This amendment—although it may require state action to account for criminal behavior conducted through juvenile sexting—is simple to execute due to its uniformity.

1. *Executing an Appropriate Amendment*

Even though the federal child pornography sentencing structure is complex and consistently altered, creating an exemption for minors does not require an invasive amendment. 18 U.S.C. §§ 2252(a), 2252(A)(a) outline the various child pornography offenses and each begins with the phrase “Any person who—.”¹¹⁷

¹¹⁰ Sands, Comment Letter, *supra* note 55; see also Sands, Statement, *supra* note 55.

¹¹¹ See Sands, Statement, *supra* note 55; see also U.S. SENTENCING HISTORY, *supra* note 42, at 51 (“[P]roduction of a morphed image of child pornography is not as serious a crime as the production of genuine child pornography”).

¹¹² “The Commission . . . views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress.” 2016 GUIDELINES MANUAL, *supra* note 43, at 2.

¹¹³ This offense was added to the statutory structure in 2009 during the last Sentencing Commission review, but it is distinctly outlined and exceptions exist.

¹¹⁴ See U.S. SENTENCING HISTORY, *supra* note 42, at 51.

¹¹⁵ *Id.*

¹¹⁶ The Supreme Court adopted an approach that “make[s] the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.” *United States v. Booker*, 543 U.S. 220, 246 (2005); see also *supra* notes 69–71 and accompanying text.

¹¹⁷ 18 U.S.C. §§ 2252(a), 2252A(a) (2012).

The Sentencing Commission could implement decriminalization by modifying these sections to read, "Any person, except minors as defined in 18 U.S.C. § 2256(1), who—."¹¹⁸ This method would be the cleanest, but it does not guarantee that later amendments, which may add new offenses or incorporate further cross-references, would maintain this consistency.

To account for this, the Sentencing Commission might advance a broader categorical exemption for minors by altering definitions in the relevant chapter of the United States Code.¹¹⁹ Within 18 U.S.C. § 2256 the Sentencing Commission could propose an amendment to the definition of "child pornography."¹²⁰ A new subsection (D) might provide:

- (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
 - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
 - (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
 - (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct[;]
 - (D) *except that the production, advertisement, distribution, transportation, importation, receipt, solicitation, or possession of "child pornography" by a minor, as defined in section (1), shall not be punishable as otherwise provided within the relevant federal offense.*

Such an amendment accounts for significant—or piecemeal—changes to the federal child pornography law without butchering the structure and cohesion of the statute as a whole.

Either amendment would shield minors from federal child pornography charges, while still permitting prosecution (where appropriate) for other, not age-related sexual offenses that involve sexting.¹²¹ If Congress were to enact a categorical exemption such as this, the states would be responsible for altering legislation, not just to incorporate the exclusion, but also to ensure some course of action exists to combat culpable acts involving sexts.

2. Looking Ahead at the Effect on States

The appeal of decriminalization of juvenile sexting through the federal child pornography sentencing structure is muddled by the inevitable effect on the

¹¹⁸ *Id.* § 2256(1) ("‘minor’ means any person under the age of eighteen years”).

¹¹⁹ *Id.* § 2256.

¹²⁰ *Id.* § 2256(8).

¹²¹ *See, e.g., id.* § 2261A(2)(B) (stalking).

states, which currently possess widely varying stances.¹²² Twenty states have some form of legislation to address underage sexting, and within four of those twenty states, a minor faces a potential felony conviction for the act.¹²³ On the opposite hand, twelve states consider lenient punishments for juvenile sexting such as informal penalties and diversion programs when appropriate.¹²⁴ Although federal decriminalization would require amending state statutes, twenty-six states have revenge porn statutes already in place, which can be used to address both nonconsensual or coercive sexting and forwarding sexts to unintended recipients.¹²⁵

Additional complications arise when considering whether the amendment should be retroactive to remedy harms caused by the previous prosecution of a minor for sexting.¹²⁶ Because few minors are prosecuted under federal child pornography law for juvenile sexting, except in egregious cases, a retroactive guideline amendment may not be in the Sentencing Commission's best interest.¹²⁷ In fact, a retroactive amendment may create an even larger hurdle to reach enactment.¹²⁸ For the purpose of pushing a sentencing guideline amendment through Congress, retroactivity should not be a consideration in the Sentencing Commission's promulgated amendment.

Once the Sentencing Commission compiles the public comment, legislative history, and existing guideline structure information into a cohesive guideline amendment, it may be proposed in May of any year.¹²⁹ And at that point, the

¹²² See U.S. CONST., art. VI. cl. 2 (noting the latitude states have in crafting laws in their own jurisdiction); *infra* note 124 and accompanying text.

¹²³ See HINDUJA & PATCHIN, *supra* note 11, at 1 (Florida, Georgia, Nebraska, and Utah).

¹²⁴ Informal penalties allow for or prescribe "counseling or another informal sanction," whereas diversion programs "include[] an option to pursue the case outside of the criminal [or] juvenile justice system." *Id.* States with informal penalties or diversion programs generally overlap, with ten states enacting informal penalties and eleven states having diversion programs. *Id.* For example, Arkansas has an informal penalty of eight hours of community service under its informal penalty structure. *Id.* at 2.

¹²⁵ *Id.* at 1.

¹²⁶ It is, unfortunately, outside the scope of this Note to include a discussion on the effect decriminalization would have on the Sex Offender Registration and Notification Act, which "provides a financial incentive for eligible jurisdictions to adopt its standards" for registering adults and juveniles for certain sex offenses. Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50,552, 50,552 (Aug. 1, 2016). See generally 42 U.S.C. §§ 16901–17 (2012); U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, JUVENILE OFFENDERS REQUIRED TO REGISTER UNDER SORNA: A FACT SHEET, https://www.smart.gov/juvenile_registration.htm [<https://perma.cc/37N8-CGPQ>].

¹²⁷ Ave Mince-Didier, *Is Sexting a Federal Offense?*, CRIM. DEF. LAW. (on file with *Ohio State Law Journal*) ("Generally, federal law requires that juveniles be prosecuted in state court, so it appears unlikely that a teen sexting case would be prosecuted in federal court.").

¹²⁸ See Megan Myers, Comment, *Technology and Teen Sex: The Need for Legislative Action in Response to 'Sexting,'* 46 TULSA L. REV. 191, 211 (2010).

¹²⁹ See U.S. SENTENCING HISTORY, *supra* note 42, at 5 (citing 28 U.S.C. § 994(p)).

issue is out of the Sentencing Commission's hands, so to speak, and up to the discretion of Congress.¹³⁰

B. *The Congressional Barrier*

Even after proposition, Congress may still refuse to implement a guideline to amend existing law or to draft new legislation.¹³¹ Although in practice it would prove excruciatingly difficult to convince Congress to decriminalize sexting after years of stringent regulations to prevent child sexual abuse,¹³² the approaches Congress can take in revising the proposition—if it survives immediate refusal—are numerous, too numerous to flesh out here.¹³³ And although the current sociopolitical climate is not ideal for amendment passage,¹³⁴ there are variables that may encourage Congress to enact a proposed guideline amendment.

For example, because the Sentencing Commission works hand in hand with highly credible organizations in the criminal justice system, Congress is likely to enact a proposed sentencing guideline.¹³⁵ Since the Sentencing Commission was established, Congress has only rejected a handful of promulgated

¹³⁰ See *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

¹³¹ *Id.* (“[The Sentencing Commission] must bow to the specific directives of Congress.”); see also SENTENCING RES. COUNSEL PROJECT, CONGRESSIONAL DIRECTIVES TO THE SENTENCING COMMISSION: 1988–2016, at 1 (Nov. 2016), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/congressional-directives-to-the-sentencing-commission.pdf [<https://perma.cc/QMY4-37VT>]; U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 51 (Nov. 2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [<https://perma.cc/D4Q7-86EV>].

¹³² Others have tackled these issues. See Duncan, *supra* note 21, at 651 (“This Article advances the dialogue by comparing, contrasting, and critiquing various components of legislation intended to address the issue of self-produced child pornography.”); Levick & Moon, *supra* note 21, at 1051–55 (critiquing the advancement of teen sexting as a law enforcement problem to be criminalized and prosecuted).

¹³³ Duncan, *supra* note 21, at 692–98.

¹³⁴ With the election of a Republican president and a Republican majority in the United States House of Representatives, this guideline amendment may be dead in the water if the response is informed by the party’s other stances on teen sexuality. *E.g.*, Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> (on file with *Ohio State Law Journal*).

¹³⁵ The Sentencing Commission considers input from the “authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.” 28 U.S.C. § 994(o) (2012). These include individuals and institutional representatives from the United States Department of Justice, the Federal Public Defenders, the United States Probation System, the Bureau of Prisons, and the Judicial Conference of the United States. *Id.*

sentencing guidelines.¹³⁶ This trend may suggest that the integrity of a Sentencing Commission-sanctioned sentencing guideline might influence an otherwise adversarial Congress to embrace a policy shift.

In addition to the Sentencing Commission's influence, sexting provisions enacted by states—which show leniency but create inconsistent sentencing structures often left to prosecutorial or judicial discretion—may create a call to action for a more politically compatible Congress.¹³⁷ A particularly sympathetic case, like Austin Yabandith in Wisconsin,¹³⁸ may spur support for an amendment. At any rate, the findings from a notice-and-comment period held by the Sentencing Commission are no less accurate whether Congress approves or rejects the resulting guideline proposal. If still timely and accurate, a future Congress may rely on these findings in any subsequent amendment proposals in support of decriminalizing teen sexting.

V. CONCLUSION

Rather than the uniform concern to hide sex, rather than a general prudishness of language, what distinguishes these last three centuries is the variety, the wide dispersion of devices that were invented for speaking about it, for having it be spoken about, for inducing it to speak of itself, for listening, recording, transcribing, and redistributing what is said about it: around sex, a whole network of varying, specific, and coercive transpositions into discourse. Rather than a massive censorship, . . . what was involved was a regulated and polymorphous incitement to discourse.
 -Michel Foucault¹³⁹

Although numerous authors from scientific, social, and legal backgrounds have posited various ways to address teen sexuality,¹⁴⁰ the Sentencing

¹³⁶ Congress did not reject a sentencing guideline proposal until 1995, more than ten years after the Sentencing Commission was established in 1984. THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 7 (Oct. 2010), <http://www.sentencingproject.org/publications/federal-crack-cocaine-sentencing/> [<https://perma.cc/SX4U-BG7H>]. But, by 1994, over five hundred changes to federal sentencing structures were enacted due to yearly Sentencing Commission amendments. Andrea Wilson, *Federal Sentencing Guidelines*, 46 MERCER L. REV. 1395, 1396 (1994).

¹³⁷ Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Nebraska, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, and West Virginia address the issue of minors sending or receiving illicit images of other minors. See HINDUJA & PATCHIN, *supra* note 11, at 1; see also S. 179, 2011 Legis. Assemb., 86th Sess. (S.D. 2011), <https://legiscan.com/SD/text/SB179/2011> [<https://perma.cc/5KSB-PZNM>] (unsuccessful South Dakota bill attempting to define and prohibit “experimental” sexting and “aggravated juvenile sexting”).

¹³⁸ See *supra* notes 13–14 and accompanying text.

¹³⁹ FOUCAULT, *supra* note 1, at 34.

¹⁴⁰ See generally Bay-Cheng, *supra* note 6, at 71 (recommending the rejection of SBSE's “conservative sexuality education agenda” to allow teens to make healthy and responsible sexual choices); Mitchell et al., *supra* note 64, at 19 (“Sexting may not indicate

Commission is a viable and logical starting point. Already responsible for periodically reviewing its promulgated sentencing structures, the Sentencing Commission has the power to propose appropriate amendments.¹⁴¹ Complete decriminalization through a statutory exemption for minors is perhaps the simplest amendment to the federal child pornography statutory structure to ensure innocent enough activities are not considered offenses due to technicalities.

While the suggestion of a guideline proposing an exemption for minors to federal child pornography laws is unlikely to be received with open arms, the Sentencing Commission may cause a shift in the social and political perspectives surrounding “healthy” expressions and explorations of adolescent sexuality.¹⁴² A report—compiled from the data and testimony collected by the Sentencing Commission from institutional contributors and public commenters—can be the first step towards normalizing modern expressions of teen sexuality. And a blanket exemption for minors accounts for future advancements in technology and eliminates any ambiguity in what activities and which perpetrators the statute intended to address.

Teens use technology as a tool for sexual exploration just the same as adults—for everything from pornography categorized by subject matter to discretely packaged condoms delivered right to your doorstep.¹⁴³ Sexting comes as a natural progression in the existent trend. And until the next technological advances, whatever or whenever that may be, teens will continue to sext.¹⁴⁴ Eventually our justice system will accommodate this behavior, the same way it adapted to other sexual expressions once considered taboo.¹⁴⁵ But we have to

a dramatic change in youth risk-taking or youth sexual behavior.”); Strohmaier et al., *supra* note 9, at 252–53 (decision-makers should distinguish between harmful and innocuous forms of sexting when making policy decisions); Temple et al., *supra* note 59, at 833 (“[Because teen sexting is so prevalent,] pediatricians, adolescent medicine specialists, and other health care providers [should] become familiar with, routinely ask about, and know how to respond to teen sexting.”); Ybarra & Mitchell, *supra* note 87, at 763 (concluding that teen sexting should be handled as a risk-taking behavior performed by teens).

¹⁴¹ The Sentencing Commission must periodically review and, if appropriate, revise the guidelines in consideration of known comments and data. 28 U.S.C. § 994(o) (2012).

¹⁴² Cf. JO ANNE GRUNBAUM ET AL., CTRS. FOR DISEASE CONTROL, YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES 2003 (May 2004), <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss5302a1.htm> [<https://perma.cc/GCB6-T3L3>] (detailing a range of potentially risky teenage sexual behaviors).

¹⁴³ “Research on adolescent development suggests that teens have always found ways to explore their sexual identity and express themselves sexually.” Levick & Moon, *supra* note 21, at 1035. Although pornography addiction is a rising topic, research is inconclusive as to whether compulsive porn viewing is related to the familiar neurological signs of addiction. Kirsten Weir, *Is Pornography Addictive?*, MONITOR ON PSYCHOL., Apr. 2014, at 46, 49.

¹⁴⁴ See Strohmaier et al., *supra* note 9, at 251.

¹⁴⁵ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The State cannot demean [homosexual persons’] existence or control their destiny by making their private sexual conduct a crime.”); *Loving v. Virginia*, 388 U.S. 1, 1 (1967) (“Virginia’s statutory scheme to prevent marriages between persons solely on basis of racial classifications held to violate

be the ones to work for the change we seek. In the words of Justice Kennedy, “[T]imes can blind us to certain truths[,] and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”¹⁴⁶

the Equal Protection and Due Process Clauses of Fourteenth Amendment.”); *see also* *Carey v. Population Servs., Int’l*, 431 U.S. 678, 714 (1977) (Stevens, J., concurring in part and concurring in the judgment) (“It is almost unprecedented, however, for a State to require that an ill-advised act by a minor give rise to greater risk of irreparable harm than a similar act by an adult.”); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (“[T]he statutory goal was to limit contraception in and of itself—a purpose that . . . conflicted with fundamental human rights.” (internal quotation omitted)).

¹⁴⁶ *Lawrence*, 539 U.S. at 579.

